UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

TRIUMPH AEROSTRUCTURES, LLC,

and **Cases 16-CA-197912**

LAWRENCE HAMM, An Individual,

and **16-CA-198055**

RODNEY HORN, An Individual,

and **16-CA-198410**

THOMAS SMITH, An Individual,

and **16-CA-198417**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA, LOCAL 848,

UNION'S ANSWERING BRIEF IN RESPONSE TO RESPONDENT'S CROSS-EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

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International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Local 848, Charging Party (UAW or *Union*), pursuant to Board Rule 102.46(b)(d), files this *Answering Brief in Response to Respondent's Cross-Exceptions to the Decision of the Administrative Law Judge* and *Respondent's Brief in Support of its Cross-Exceptions to the Decision of the Administrative Law Judge*.[1]

I. Statement of the Case

The Complaint alleges that Respondent Triumph Aerostructures, LLC (*Triumph* or *Company*) violated Section 8(a)(1) and (5) of the National Labor Relations Act (*Act*), 29 U.S.C. §§ 8(a)(1), (5), by (1) unilaterally discharging bargaining unit employees Thomas Smith and Rodney Horn without first affording the Union notice and an opportunity to bargain, and (2) laying off bargaining unit bond shop workers without negotiating to a good faith impasse. Ex. GC-1(s). The hearing took place April 22 and 23, 2019 at Region 16 in Fort Worth, Texas. On September 30, 2019, Administrative Law Judge Robert A. Ringler issued his *Decision* (JD-74-19), recommending dismissal of the Complaint in its entirety and finding that Triumph did not violate the Act.

The case is now before the Board on the General Counsel and Union's exceptions to the *Decision*. While the General Counsel has filed exceptions to Judge Ringler's findings and conclusions regarding both the discretionary discipline charges relating to Smith and Horn and the charge that Triumph violated the Act in connection with the bond shop layoffs, UAW's exceptions

[1] The following citation abbreviations will be used throughout this brief: *ALJD* to refer to ALJ Robert Ringler's *Decision*, *Tr*. to refer to the hearing transcript; and *Jt. Ex.*, *Ex. GC*, *Ex. R*, and *Ex. CP* to refer to the Joint, General Counsel, Respondent, and Charging Party Union hearing exhibits, respectively, *XE* to refer to Respondent's cross-exceptions*; R. Br.* to refer to Respondent's brief in support of its cross-exceptions, and *U. Br.* to refer to the Union's brief in support of its exceptions. Citations to the pages and line numbers of Judge Ringler's *Decision* (*ALJD*) and the hearing transcript (*Tr.*) are given as, for example, "1:2-3," where the number before the colon is the page number and the numbers following the colon are the line numbers.

relate only to Judge Ringler's findings and conclusions regarding the bond shop layoffs. Although Judge Ringler recommended the dismissal of the Complaint in its entirety, Respondent has filed cross-exceptions to what it contends is the ALJ's failure to make alternative findings as to alleged additional grounds for dismissing the Complaint. R. Br. at 1.[2]

The bond shop layoffs case is straightforward, involving the application of well-established Board precedent on the law of impasse to a well-developed evidentiary record of the parties' negotiations. Yet without explanation, Judge Ringler disregarded most of that evidence in finding that a good faith impasse existed, issuing a bare-bones *Decision* that contains no credibility determinations and virtually no specific references to the evidence of record other than several exhibits and a few unsupported and conclusory characterizations regarding certain aspects of the evidence. The Union has excepted to the Judge's deeply-flawed and perfunctory analysis of the *Taft* factors and has pointed out that the Decision does not provide an adequate basis for the Board's review and that the case should therefore be remanded to the ALJ for the preparation of a supplemental opinion.

In support of its cross-exceptions, Triumph argues that (1) the ALJ failed to consider the impact of an alleged "economic exigency" on the Company's bargaining obligations, (2) the ALJ should have dismissed the bond shop layoff allegations because the Union waived bargaining over the decision to conduct the layoffs, and the Company did not have to bargain to impasse over only the effects of the decision, and (3) the ALJ failed to address additional record evidence that the Company claims support the ALJ's finding of that a bargaining impasse existed. The Union will address each of the Company's arguments in turn to demonstrate that should the Board find that

[2] Because the Union has not excepted to the ALJ's findings and conclusions regarding the disciplinary allegations, the Union will not answer Triumph's cross-exceptions related to the disciplinary allegations, including Triumph's Cross-Exception Nos. 1-3. XE at 2, no. 1-3.

the ALJ's finding of impasse based on his analysis of the *Taft* factors was erroneous as the Union has argued in its brief in support of its own exceptions, the arguments that the Company puts forth by way of its cross-exceptions do not provide any additional grounds on the basis of which the Board should adopt the *Decision*.

II. Statement of Facts

The parties were able to streamline their presentation of the case to Judge Ringler through their *Joint Stipulations of Fact* [Jt. Ex. Z], which provide a timeline of many of the salient events forming the basis of the Second Amended Complaint. The *Joint Stipulations of Fact* were set out at length in the Union's brief in support of its exceptions for the Board's convenience. U. Br. at 6-8. The following is a summary of the testimony presented to Judge Ringler at the hearing.[3]

Counsel for the General Counsel called James Ducker and David Barker to testify in its case-in-chief. Respondent called Danielle Garrett and Eileen Rowe to testify in its case. Counsel for the General Counsel recalled Barker in rebuttal. In light of the inherently fact-intensive nature of an evaluation of the Board's *Taft* factors for determining the existence of a genuine impasse, a detailed examination of the extensive testimony surrounding the parties' bargaining over the bond shop layoffs is warranted. This is particularly so in light of Judge Ringler's inexplicable failure to address the credibility of the witnesses and the specific evidence presented at the hearing, along with his failure to even reference relevant testimony on critical matters without providing any reason whatsoever for disregarding such testimony.

[3] This summary of the testimony is identical to that set forth in the Union's *Brief in Support of UAW Local 848's exceptions to Administrative Law Judge's Decision and Recommended Order*. U. Br. at 9-37. It is repeated in this brief for the Board's convenience.

1. Triumph's Corporate Structure and Red Oak Operations

Danielle Garrett is Senior Director of Labor Relations for all of the Triumph Aerospace Structures companies, which include facilities in Nashville, Tulsa, Red Oak, Marshall Street, Hawthorne, and Stuart, Florida. Tr. 233:12-21. She was on the executive team that made the decision to close the Jefferson Street plant due to lease issues and to build a new facility in Red Oak. Tr. 234:5-13. She was responsible for all human resources matters at Red Oak including staffing, establishing initial terms and conditions of employment, and bargaining with the Union, including negotiations for a first contract. Tr. 234:5-21. Norm Porter, Manager of Human Resources at Red Oak, reported to Garrett. Tr. 246:8-21. He was responsible for the day-to-day labor relations at Red Oak, whereas Garrett oversaw Red Oak, Marshall Street, and some other plants. Tr. 246:8-21.

Eileen Rowe currently works for Bombardier Aerostructures at Red Oak, a facility that was formerly owned and operated by Triumph. Tr. 373:20-374:2. Prior to working for Bombardier, Rowe worked for Triumph from December 2014 until February 6, 2019. Tr. 374:3-6. From December 2014 until September 2017, she was Triumph's bond shop manager before she moved to another area to broaden her experience. Tr. 374:9-20. As bond shop manager, her responsibilities included analyzing staffing levels and deciding what level of staffing was needed in the bond shop. Tr. 374:21-375:12. All of the managers at Red Oak and the Industrial Engineers met every Monday and reviewed staffing, looking forward from three months to one year based on the volume of work available; later the meeting was changed to biweekly. Tr. 375:9-18. The Program Office worked directly with the customers with regard to their specific contract terms, and Rowe was not involved in that process. Tr. 379:12-19.

Triumph's Red Oak facility is one rectangular building, and the work consists largely of assembly and bonding operations. Tr. 240:24-241:7, 242. The Company performs bonding operations on various programs for Bell and Gulfstream, assembly work on the Gulfstream G550 and V-22, and has "key operations largely to build large aircraft structure components." Tr. 241:3-11. Garrett testified that because Triumph builds components for larger customers, its work is entirely dependent on the larger customers' orders, which is in turn directly tied to the end consumer. Tr. 241:16-23. The customers also set the flow and demand for product deliveries. Tr. 242:1-10.

The bond shop is located at the rear of the facility and is housed in the *Cleaning Room*, where all of the bonding operations take place. Tr. 242:11-243:2. It is a self-contained room with separate ventilation and air conditioning that has to be maintained at a climate different than the rest of the facility. Tr. 243:3-7. The employees who work in the bond shop are in the Bonder classification with four different labor grades that exclusively perform bonding work. Tr. 243:8-13. The bargaining unit also has an assembly classification, which performs assembly work, painting, toolmaking, and maintenance. Tr. 243:14-19. The assembly shop is the area where parts of the aircraft are actually put together. Tr. 77:24-78:5. The *5S* group performs various tasks designed to streamline work processes for efficiency which do not require much skill. Tr. 76:20-77:8; 265:1-12, 342:9-343:25.

Garrett stated that the initial terms and conditions of employment for the Bonder classification differ from those of other classifications as related to the flow of work or work assignments and scope. Tr. 243:20-24. The bond shop generates its own cost data and performance trends, separate from assembly. Tr. 244:1-6. Whereas assembly work involves drilling and filling parts, bond shop work requires use of many different machines as well as a substantial amount of

work by hand. It involves laying pieces, vacuuming them, then placing them into an autoclave, a giant oven. Tr. 244:7-18. After the components are "cooked," they are trimmed and shaped, then go thorough NDI (Non-Destructive Inspection), then are sent to assembly to go onto an aircraft. Tr. 77:9-23, 244:18-22; 405:23-407:4.

2. Union Representation of the Red Oak Bargaining Unit

James Ducker, who works as a toolmaker at Triumph's Marshall Street facility, served as President of Local 848 from November 2014 to June 2017. Tr. 61:19-62:9. There was no contract in place at the Red Oak facility when Ducker took over since bargaining for a CBA at Red Oak began in mid-2015. Tr. 63:1-7. As Local Union President, Ducker ran the day-to-day business of the Union Hall, chaired the Executive Board, and was on the negotiating team and grievance process for all four bargaining units represented by Local 848. Tr. 63:8-12. His role on the negotiating team included participating in the Red Oak contract negotiations; the parties started negotiating in April or May 2015 after the resolution of the Union's unit clarification petition and reached a comprehensive agreement at Red Oak [Jt. Ex. Y] approximately three years later in March 2018. Tr. 63:13-21; 238:20-240:20. The Red Oak CBA is currently in effect. Tr. 240:21-23.

David Barker has been an International Representative for the UAW since November 1, 2015. Tr. 61:19-62:9. His main duties in that position are to negotiate contracts and participate in arbitrations for several bargaining units in a geographic area encompassing Tulsa and Northern Oklahoma to Grand Prairie, Texas, including Local 848. Tr. 174:13-175:4. Barker assumed responsibility for Red Oak from former International Representative Wendell Helms around February 2016. Tr. 62:10-20.

In addition to Ducker, the Union's negotiating committee included Barker and unit employees Adam Rondon, Corey Gregg, Jimmy Ricks, Tommy Bulin, and Richard Guerra. Tr. 63:22-64:6. The negotiating team also included Lindsay Portier, a notes recorder. Tr. 64:6-7. Triumph's negotiating committee included Garrett, Porter, Jorge Gil, a Human Resources representative, and Wendy Bailey, a Human Resources representative who served as note-taker. Tr. 64:8-24. During the contract negotiations Ducker and Garrett had each other's cell phone number and e-mail address. Ducker and Garrett exchanged e-mails and, on occasion, text messages. Tr. 65:1-16.

3. Facts Regarding the Bond Shop Layoffs

a. Triumph's Status Quo Reduction in Force Policy

Prior to the Company's recognition of the Union at Red Oak in January 2014, it implemented a status quo policy for reductions in force that was effective as of August 1, 2013. Tr. 235:3-11; Jt. Ex. I. The purpose of the *Reduction in Force* policy [Jt. Ex. I, pp. 2-4] was to provide guidelines for the layoff process. Jt. Ex. I. The policy included competencies associated with employee performance. Tr. 235:12-18. It was substantially similar to the layoff policy that Triumph applied to salaried and non-represented hourly employees in all of its affiliated companies. Tr. 235:3-9.

Triumph had informed the UAW that it had the RIF policy, which provided for the Company's use of performance rankings to reduce headcount. Tr. 110:1-111:21. The Union was also aware that the Company used competency ratings for annual evaluations and merit increases in wages. Tr. 111:22-112:22. Because the Company had no status quo loan policy in place, the only way for a loan policy to be implemented was through negotiations with the Union. Tr. 112:24-113; 193:18-24. Similarly, there was no status quo policy on transfer or recall rights. Tr. 113:6-10,

193:25-194:10. Triumph refers to its status quo ranking method for layoffs based on a list of competencies as *rack and stack (RAS)*, which does not include any consideration of seniority. Tr. 176:15-177:2.

Before the bond shop layoffs in dispute, the parties addressed the RAS method in their first contract negotiations at Red Oak. Tr. 177:3-5. The Union was concerned with the method's subjective nature in that it omitted other intangible qualities such as being a good "team player" or having excellent communication skills. Tr. 177:6-18. The same competencies are used in the annual performance assessments at Red Oak, although employees are not comparatively ranked for that purpose. Tr. 299:9-300:3. The same RAS competencies were also used previously in a 2015 Bond Shop layoff. Tr. 300:1-23.[4]

b. On March 28, 2017, Triumph Notifies the Union of Its Intent to Lay Off 12 Bond Shop Employees

Rowe testified that at the beginning of April 2017, Blake Mansfield, an Industrial Engineer with whom she worked in the bond shop, provided her with a forecast showing that a reduction in head count in the bond shop was needed due to declining orders. Tr. 380:5-385:12; Ex. R-15. The forecast report reflected that at the time, the head count in the bond shop was approximately 98 employees. Tr. 383:3-17. Rowe testified that the report showed that by the end of April, the staffing demand was 80 employees for several months, then declining further thereafter. Tr. 5-12.

Rowe and Garrett discussed that there was not enough work in the bond shop for the total number of employees, and addressed how a layoff should be handled under the circumstances

[4] Both Counsel for the General Counsel and the Charging Party Union objected to and requested a running objection to Garrett's testimony concerning the 2015 Bond Shop layoff at Red Oak as being irrelevant to the 2017 Bond Shop layoff at issue. Tr. 300:13-304:16. Judge Ringler determined to allow some discussion of the 2015 Bond Shop Layoff for a "limited purpose" [Tr. 300:13-16] and as "background on what happened in the past" [Tr. 303:13-24]. Ultimately, he cut off the Company's presentation of testimony and evidence on that topic, finding that sufficient background had been presented. Tr. 304:6-12. In its post hearing brief, the Union renewed its objections to any testimony or exhibits regarding the 2015 Bond Layoff as being wholly irrelevant to the present case.

when they had a Union but no labor contract. Tr. 245:7-21, 246:22-2, 385:16-19. Rowe first let Garrett know that the volume of work in the bond shop was not substantial, then after gathering more information, Rowe told Garrett that the excess head count might be as few as six or seven or as many as fifteen employees. Tr. 247:2-7; 385:20-386:7.

Garrett informed Rowe that she would have to contact the Union, and the decision was made to notify the Union of the Company's intent to lay off 12 employees in the bond shop effective April 21, 2017. Tr. 247:2-7; 386:8-11. According to Garrett, the April 21 date was chosen so as to build in time for the Company "to have the appropriate conversations" with the Union about the tentative layoff plans. Tr. 247:25-248:16. Rowe testified that she discussed April 21 as a possible layoff date because only 80 employees should have remained in the bond shop by the end of April according to the forecast. Tr. 387:5-11.

Triumph first notified the Union of its intent to lay off 12 employees in the bond shop at the Red Oak facility on March 28, 2017. Tr. 176:1-14; Jt. Ex. G. On that date, Porter sent Ducker and Barker a letter as "official notification to the Union" of the Company's plan, including that Triumph was considering April 21, 2017 as the date for the layoff. Tr. 66:15-67:15, 246:8-21; Jt. Ex. G. The employer indicated that the number of employees in the bond shop would be reduced by at least six and no more than 15 in the coming weeks. Jt. Ex. G. This range was chosen because at the time the Company presented the notice it was not sure how many employees would be included in the layoff. Tr. 249:6-9. The Union understood that when Triumph stated in its March 28 letter that it "intends to comply with the status quo layoff policy making layoff selections," it referred to its RAS procedures as set forth in its status quo reduction in force policy of August 1, 2013, and that any negotiations that would occur would be over an alternative to those procedures. Tr. 192:5-193:17; Jt. Ex. A, Jt. Ex. G.

By letter dated March 30, 2017, Barker informed Porter that the Union accepted the opportunity to negotiate the anticipated layoffs and requested negotiation dates as soon as possible due to the time constraints the Company had imposed on the Union by its short notice. Tr. 67:16-68:7, 251:14-21; Jt. Ex. H. On the same date, March 30, Barker sent Porter a request for information regarding the layoffs, including for a list of bond shop employees in seniority order. Tr. 69:9-70:4; Jt. Ex. I.

Triumph and the Union agreed to bargain over the proposed layoffs at a Hilton Garden Inn on April 5, 6, and 7 since the parties had previously scheduled merit increase negotiations on those dates. Tr. 70:5-18. According to Garrett, the parties had a total of nine days previously scheduled for negotiations in the month of April, and the Company's proposal was to change course and focus on the layoffs in the bond shop. Tr. 251:23-252:5. The parties met in the hotel conference room. When they were not in joint session, Triumph representatives remained in the conference room and the Union representatives conferred at a large conference table in the lobby. Tr. 268:21-269:8. It was common for the parties to caucus frequently in separate meetings. Tr. 339:4-11.

c. Triumph Provides an Incomplete Response to the Union's March 30 Information Request

On March 31, 2017, Triumph provided an incomplete response to the Union's March 30, 2017 information request. Tr. 74:22-75:12. Jt. Ex. J. The response was incomplete in that it did not provide the requested segregated list of Red Oak unit employees who had not worked formerly at either Jefferson Street or Marshall Street, and also did not include requested attendance cards for all bond shop employees for the one-year period from April 1, 2016 to April 1, 2017. Tr. 75:13-22; Jt. Ex. J. The Company did not provide the requested time cards until April 19, 2017, the day before it had planned to notify the 12 employees of the layoff. Tr. 76:8-13.

Garrett testified as to what was involved in gathering the attendance cards. The Company kept the attendance cards for approximately 400 to 500 bargaining unit employees alphabetically, and one administrator recorded attendance by hand. Tr. 253:17-254:4, 19-24. Garrett stated that providing the cards would have required Triumph to review them to find the bond shop employees, make photocopies, and find those for the previous year and then follow the same procedure. Tr. 254:1-6. She viewed it as burdensome for management to go through that process given that the Company had previously provided disciplinary records for attendance and that management would not consider attendance cards in determining the RAS factors. Tr. 254:6-9; 255:9-15. Instead, the Company decided to review the disciplinary records on file, which might include disciplinary actions imposed for attendance deficiencies. Tr. 255:16-256:11. Some of the absences noted on timecards might have been showed as excused elsewhere. Tr. 256:12-18. However, Garrett acknowledged on cross-examination that you could use the timecards to verify the date on which an employee was absent. Tr. 335:15-336:2.

d. April 5 Bargaining Session

At the first bargaining session on April 5, 2017, Ducker, the negotiating committee members, and note taker Lindsay Portier participated for the Union. Barker, UAW International Representative, was unavailable because he had an emergency meeting out of state that day. Tr. 70:19-71:6; 177:19-178:4. Garrett, Porter, Bailey, and Gil participated for Triumph; Bailey and Gil took notes. Tr. 70:23-24, 258:1-259:7; Ex. R-4. The meeting began at either 9:17 or 9:18 a.m.[5] and concluded at 10:53 or 10:54 a.m. for a total meeting time of approximately one hour, 35 minutes, including caucus time. Tr. 262:6-13; Ex. GC-2; Ex. R-4. After a brief discussion of 2017 merit increases for unit employees, the parties discussed Triumph's failure to provide the bond

[5] There is a one-minute discrepancy in the times recorded in the parties' bargaining notes. Ex. GC-2; Ex. R-4.

shop attendance cards that the Union had requested in its March 30, 2017 information request, and then at approximately 9:31 a.m. turned to a discussion of the proposed layoff. Ex. GC-2, pp. 2-4. Ducker recalled that the parties had discussed the possibility of reaching an agreement to loan the employees from the bond shop to different job families in order to keep them gainfully employed. Tr. 76:14-19.

At 9:58 a.m., the Company presented to the Union a proposed letter agreement for up to 20 employees to be loaned to other unit classifications for a period of up to six months without altering their wage rates. Tr. 78:6-79:10; Jt. Ex. K. Triumph's initial proposal provided for a loan of affected bond shop employees to other job classifications and also provided that the compensation of the transferred employees would not be affected for the duration of the loan. Jt. Ex. K. Garrett agreed that the intent was for the proposed loan agreement to be specific to the 5S job family. Tr. 339:13-340:8. At this point, the parties had not discussed loans to the assembly department, but only "loans to do 5S and some other things." Tr. 340:6-17. The Union responded to the proposal the following day, on April 6. Tr. 80:2-6. Ducker explained that the Union was not able to present a counter-proposal that same day because the parties had to adhere to a predetermined schedule for addressing discipline issues. Tr. 79:11-80.

e. April 6 Bargaining Session

On April 6, the parties held a second bargaining session beginning at 9:07 a.m. Ducker, the bargaining committee, and Portier participated for the Union; Garrett, Bailey and Gil represented the Company. Tr. 80:11-17. Barker, who had returned from his out-of-state trip earlier that morning, arrived at 11:03 a.m. Tr. 80:11-15; 178:5-22; Ex. GC-3, p. 3. Portier again took comprehensive bargaining notes of the second meeting. Tr. 80:18-82:2; Ex. GC-3. The parties discussed the Company's incomplete response to the Union's March 30 information request.

Ducker explained to Garrett that the timecards were needed to validate the disciplinary actions, or if the Company were to use an evaluation process, to verify that management was consistent in its evaluation of employees' attendance. Tr. 76:2-8. Soon after Barker arrived, at 11:04 a.m., the Union presented Triumph with a counter-proposal to the Company's proposed letter agreement of the previous day. Tr. 82:18-83:15, Tr. 179:11-24; Jt. Ex. L.

Ducker explained that the Union's principal concern with Triumph's April 6 proposal was that the Company would use RAS as the method to select who would be laid off and that under the Company's proposal, an employee who refused to be loaned effectively would be terminating himself. Tr. 82:11-20. The Union concurred that a loan arrangement would be a good solution and wanted to work toward an agreement that would meet the needs of both parties. Tr. 82:18-25; 158:21-159:8. To that end, the Union's April 7 counterproposal provided that should an employee refuse to be loaned and refuse to perform assigned tasks outside the bond shop, he would be laid off for a period not to exceed six months from the date of the agreement, and further provided that the Company would seek volunteers for loaning rather than make its own assignments for loan by RAS. Tr. 83:11-24. The Union believed that using volunteers was a "win/win" because some managers did not know or understand what varied job experience some of the employees had. Tr. 196:11-19.

The Union proposal also included a provision that Triumph would make every effort to place loaned employees into positions "where they may have previous experience or may be successful." Tr. 83:25-84:4. When Garrett asked for a clarification as to what the UAW meant by putting employees in a position to be successful, the Union explained that an employee should not be put in a position where he did not have a chance to perform the job effectively because of whatever limitations that he may have, but should instead be put in a job that he had the ability to

perform so as to create a "win-win situation." Tr. 84:8-19. The Union proposed to make that happen by discussing such issues with the Company. Tr. 84:15-23.

Garrett testified that Triumph was opposed to seeking volunteers from the bond shop to loan in positions in other departments because not all employees in the bond shop performed the same tasks even though they were in the same job family. Tr. 266:3-15. The Company wanted to loan employees who did not have active bond shop work. Tr. 266:16-23. Garrett also stated that she did not view the Union's proposal to loan volunteers as covering situations where either too few or too many employees volunteered to be loaned. Tr. 267:8-16.

After less than 15 minutes of discussion of the Union's counterproposal, the parties took a caucus and lunch break, during which time the Union representatives discussed proposals among themselves. At 1:29 p.m., Garrett presented a new counterproposal to the Union's representatives in the hotel lobby, as follows:

4/6/17 walked to Union @ 1:29 pm

Letter of Agreement
Red Oak Bond Shop Temporary Loans

In as much as the Company tentatively planned to layoff approximately 12 bond shop employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- In lieu of layoff, the Company may loan not more than 20 bond shop employees to other UAW job classifications and/or assignments associated with continuous improvement/lean activities for a period not to exceed six (6) months from the date of the instant agreement.
- Employees who are loaned will not have their compensation affected for the duration of the loan.
- The Company shall have the sole discretion to determine which individual bond shop employees will be loaned outside of the bonding job classification.
- The Company shall have the sole discretion to determine the job assignments of loaned employees.
- Should the Union have concerns regarding a loaned employee(s) and/or the type of work said loaned employee(s) is assigned, the Company will meet with the Union to discuss such concerns in an attempt to reach mutual resolution.
- Should an individual employee refuse to be loaned and/or refuse to perform the assigned tasks outside, the employee shall be deemed to voluntarily terminate his employment.
- Should the need arise to increase the number of employees loaned out and/or the duration of the loan, the parties will meet to discuss the possibility of an increase of scope.

This agreement is specific to the facts and circumstances herein, and shall not be cited by either party as precedent setting.

Tr. 84:24-86:4, Tr. 179:25-180:25-181:5; Jt. Ex. M.

Notably, Triumph's April 6 counterproposal continued to provide for a loan of bond shop employees and that their compensation would not be affected for the duration of the loan. Jt. Ex. M. The proposal to maintain the employees' level of wages was significant because beginning wages in the assembly department were only $13 to $15 per hour. Tr. 164:8-13. Regarding selection, Triumph's April 6 counterproposal provided for the Company to have sole discretion to determine which employees would be loaned out of the bond shop. Tr. 268:5-12; Ex. Jt.-M.

The Union agreed with some aspects of Triumph's 1:29 p.m. counter-proposal, including terms that the Company was still willing to loan employees, had made provision for the parties to meet and discuss concerns regarding job assignments, and that the Company had agreed to meet to discuss any possibility of an increase in the scope of the loan with respect to quantity of employees or duration. Tr. 86:19-87:6. The Union disagreed with the provision that employees would be considered to have voluntarily terminated if they refused their new job assignment, and the Union's representatives were still "trying to get past" the Company's selection of employees for loan in its sole discretion. Tr. 86:21-87:6; 159:9-22. Garrett testified she told the Union's representatives that if they insisted on using volunteers, she was doubtful that the loan proposal would work and she suggested that the parties focus on a different approach. Tr. 269:9-270:5.

Regarding Triumph's voluntary termination provision, the Union did not want to see employees put into a new job only to find that they were either physically or intellectually unable to perform it, and then find themselves being forced to "voluntarily" terminate for that reason. Tr. 159:19-160:13. For example, an employee without drilling experience might be moved to a position where he had to perform a substantial amount of drilling activities, which Ducker noted required a talent for that type of work, as did riveting and bucking. Tr. 160:25-161:10. On the other

hand, a bonder could probably adapt well to the sealing process and inspections, which required skills similar to those used in the bond shop. Tr. 161:4-15.

The Union representatives had discussed Triumph's 1:29 p.m. counterproposal among themselves for only 45 minutes when Garrett, Bailey, and Gil walked into the hotel lobby and informed them that they had rescinded the employer's proposal. Tr. 87:7-21, 162:11-17; Ex. GC-3, p. 6. During that 45-minute period the Union representatives had discussed the proposal among themselves. They had exerted their best efforts into making the loan arrangement work and they believed that the parties were close to an agreement. Tr. 162:5-14; 181:8-14. However, only 45 minutes later – without waiting for any response from the Union -- Triumph's representatives advised the Union that they had made the decision to go forward and that 12 bond shop employees and three NDI employees[6] would be laid off, and that Garrett would state Triumph's explanation on the record the following day once she was certain that the layoff would happen. Tr. 87:22-88:6; 107:23-108:10; 162:11-17. 181:15-182:12.

Early that morning Ducker had "absolutely felt like we could work something out." Tr. 160:14-17. Even that afternoon before the Company abruptly withdrew its proposal, he "still felt like there was the ability to continue to negotiate the loan." Tr. 160:18-24.

f. April 7 Bargaining Session

In the negotiation session of April 7, Barker, Ducker, the negotiating committee, and Portier represented the Union, and Garrett, Gil, and Bailey represented the Company. Tr. 88:8-15. Portier again took extensive bargaining notes. Tr. 88:16-89:19; Ex. GC-4. The meeting began at 10:50 a.m. and the parties discussed pay increases and the bond shop layoffs. Tr. 182:13-183:2.

[6] NDI refers to the Company's Non-Destructive Inspections Group. Although three employees in that group were originally slated to be laid off, the Company later changed its mind due to the fact that, owing to their high skills set, those employees were "very hard to come by." Tr. 285:12-22.

After a brief period in which the parties presented wage proposals, at 10:55 a.m. the Union presented a request for certain information concerning unit employees that had been hired since February and had received skills training to obtain certifications to perform unit assembly work. Tr. 89:21-90:16; Jt. Ex. N; Ex. GC-4, p. 2. The Union sought the information because it knew that Triumph had moved some contractors from the bond shop into a training class and into assembly, and with regard to the pending layoff, the Union planned to propose that bond shop employees be considered for those assembly positions instead of contractors. Tr. 90:17-91:3, 168:21-25, 183:3-184:5; Ex. GC-4, pp. 2-7; Jt. Ex. N. Although the parties engaged in an extensive discussion during the April 7 bargaining session as to why the UAW sought the information, Garrett never provided it, asserting that the Union did not have any right to information concerning the contractors. Tr. 91:4-5, 169:1-4; Ex. GC-4, pp. 2-7. Had the Union been informed that Triumph was transferring contractors from the bond shop to assembly, the Union negotiating committee would have made proposals to eliminate the contractors. Tr. 5-14. Garrett maintained, incredibly, that she was "confused" by the Union's straightforward information request. Tr. 270:20-23.

Immediately following the discussion of the Union's April 7 request for information, at 11:14 a.m., the Union presented a new proposal that included a "markup" revision of Triumph's last proposal of April 6, which the Company had rescinded abruptly: Tr. 91:6-23; Ex. GC-4, p. 7; Jt. Ex. O. Because Triumph had taken any potential loan arrangement off the table, the Union proposed transfer rights for the employees in an effort to reach an agreement. Tr. 91:6-15, 163:1-10, 184:6-23, 222:22-223:4; Jt. Ex. O. The Union viewed a loan as a temporary solution, and it hoped to facilitate a transfer of employees into other jobs by order of seniority while still retaining the rights to their previous jobs. Tr. 92:1-93:2. The Union was searching for common ground with modified terms. Tr. 198:4-15.

Garrett expressed the employer's view that the Union's April 7 proposal that called for employees to be moved out of the bond shop on the basis of seniority was unacceptable because the Company would have no control over who was selected for layoff. Tr. 272:17-273:6. Garrett also addressed Triumph's opposition to the Union's proposal that the compensation of employees transferred from the bond shop to assembly not be affected. Tr. 274:1-275:3. She believed it to be inequitable for bond shop employees with no experience in assembly to continue making the hourly wage of $39 that bond shop employees earned. Tr. 274:7-15. The Company sought to offer the employees a wage reflective of their skills and experience. Tr. 274:16-21.

Garrett strained credulity with her explanation as to why the Company had not been opposed to locking in employee wage rates on a loan but had refused to accept locking in rates on employee transfers to assembly. She testified that a loan was temporary in that an employee might be loaned to another department for a period up to six months, whereas a transfer to assembly was a permanent change from one job classification to another. Tr. 275:9-276:2. She stated that in a loan situation, an employee who was loaned would automatically return to the bond shop at the end of six months. Tr. 276:3-16.

Garrett stated that Triumph would take a look at the proposal and follow up with the Union that afternoon although management planned to conduct the layoff using the RAS methodology as established in the terms and conditions of employment. Before the negotiation session ended at 11:53 a.m., 39 minutes after the Union had presented its proposal, she stated that the Company would try to develop a proposal that "addresses all of that to the best of our ability" and then follow up with the Union in the afternoon. Ex. GC-4, pp. 7-15. At around 1:35 p.m., Barker, Corey Gregg, and Tommy Bulin had an off-the-record "sidebar discussion" with Garrett, at which time she hand-delivered the Company's counteroffer to the Union's proposal earlier in the day as follows:

4-7-17
gave to Barker
off Record

Letter of Agreement
Red Oak Bond Shop and NDI Layoffs

In as much as the Company tentatively plans to lay off approximately 12 bond shop and approximately 3 NDI employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- In lieu of processing layoffs under the initial terms and conditions of employment, which identifies a rack and stack process based upon certain competencies, the Company has agreed to utilize a modified rack and stack based upon competencies as proposed by the Union (competency assessment attached hereto).
- Layoffs shall be processed in accordance with the rack and stack scoring, based upon an employee's overall performance rating, with the bottom rated employees laid off in inverse seniority order by job classification. Seniority shall be determined by the last date of hire.
- Employees, who are affected by layoff, may apply for an open assembly position at the Company's Red Oak location. Any employee affected by layoff who applies for an open assembly position, shall be given an offer of employment for the appropriate assembly labor grade at an hourly rate of pay commensurate with said employee's assembly and/or assembly inspection experience.
- Employees affected by layoff who apply and accept an offer for an assembly position will retain their seniority without a break in service.
- Employees who accept a position in assembly shall be on a probationary period for ninety (90) working days. Should the employee not met expectations in assembly, the employee shall be terminated.
- Employees who are laid off from either the bond or NDI classification shall have no rights to re-enter the classification from which they were laid off.

This agreement is specific to the facts and circumstances herein, and shall not be cited by either party as precedent setting.

Tr. 93:3-23, 184:24-185:7; Ex. GC-4, p. 15; Jt. Ex. P. Triumph's new proposal focused on transferring bond shop employees to the assembly classification. Tr. 277:15-278:1. The Company had no transfer procedures in place as part of its status quo layoff procedures. Tr. 278:2-11. Attached to the proposal was a *Competency Assessment*, or RAS, that management planned to use for the layoffs. Tr. 94:8-11; Jt. Ex. P. The employer's proposal provided for evaluating and ranking the employees in the RAS procedure and for laying off the lowest rated employees in order of seniority. Tr. 278:12-279:11.

Garrett further testified about an off-the-record discussion she had with Barker concerning the modified RAS proposal. Barker indicated that the Union would consider it. Tr. 281:3-8. She

also recalled discussing her position on the issue of pay rates upon the transfer of employees to assembly. Tr. 281:9-282:3.

For his part, Barker described the sidebar conversation in which he received Triumph's April 7 counterproposal as a "brainstorming" session in which many things were discussed. Tr. 185:2-12. Among other things, the parties to the sidebar conversation discussed ways to modify the RAS procedure that would remove the subjectivity inherent in the procedure. Tr. 185:7-16. He explained that the employer's use of the RAS procedure was previously known to the Union since the subject had been discussed in contract negotiations since 2016, with the Union working since then to remove the subjectivity inherent in the process and include factors that could be evaluated and measured. Tr. 185:17-186:5. The RAS factors associated with the Company's April 7 counterproposal were revised in that the number of so-called competencies had been substantially reduced and that some of the most subjective competencies had been removed. Tr. 186:6-12. Barker also testified that the Union's concerns with the Company's April 7 counterproposal were focused on its provision that laid-off employees had no right to return to their former classification, and its provision that based seniority on "the last date of hire," which the Union construed as excluding years worked at the Jefferson Street facility. Tr. 186:19-187:1.

Triumph's April 7 proposal remained open at the end of the bargaining session. Tr. 15-22; Ex. Jt.-P. Garrett related that the Company was still open to further negotiations at that point. Tr. 347:23-348:4.

g. Union's Interim Correspondence

The parties did not meet again for another 12 days until April 19. Tr. 94:12-23. Although Barker was also involved in other contract negotiations in Tulsa that week, the Union's negotiating committee was available. Tr. 132:5-Tr.133:1. Garrett met with Barker and other UAW

representatives in Tulsa, Oklahoma in previously scheduled contract negotiations on April 12, 13, and 14 (Wednesday, Thursday and Friday). Tr. 282:13-283:13, 283:1-13. She was in Dallas on April 10 and April 11, but Barker was not available on those dates. Tr. 282:13-283:13.

Despite not meeting with Triumph the week of August 10 to 14, the Union initiated correspondence between the April 7 and April 19 bargaining sessions in an effort to continue making progress in the bond shop negotiations. Tr. 94:12-23; 134:23-135:7. By letter from Barker to Garrett dated April 14, 2017, the Union rejected the Company's open counterproposal from the April 7 meeting, offered suggestions regarding the handling of transfers, and proposed retirement incentives to reduce the amount of people in the bond shop. Tr. 94:21-95:25; Jt. Ex. Q.

The letter signified the UAW's commitment to proceed with the bond shop negotiations since circumstances required more than a week to elapse without any activity and the Union expected Triumph to consider other proposals. Tr. 95:25. For example, the Union intended to propose retirement incentives because Triumph had successfully used such incentives on prior occasions to reduce the work force, and the Union believed this approach might reduce any need for bond shop layoffs. Tr. 95:16-25; 137:21-138:16, Tr. 188:12-23. At that point, the Union representatives were "trying to think of everything that [they] could outside the box to give these people an opportunity to keep their job." Tr. 138:14-16.

Garrett testified that the Union's April 14 letter was confusing to her. Tr. 286:3-287:10. She viewed the letter as withdrawing discussions as to the modified RAS as well as about moving bond shop employees into assembly jobs. Tr. 286:17-22. She claimed she did not understand what the Union meant when it said, "they would like to see the following," in that she did not know whether the Union intended those terms to be negotiated or merely that the Union wanted to see it "because it would be nice." Tr. 287:3-10. She perceived the UAW's April 14 correspondence to

embody the same proposal the Union had made on April 7, which Triumph had rejected, and the retirement incentive proposal to be "kind of out in left field." Tr. 287:11-288:4; 288:23-24.

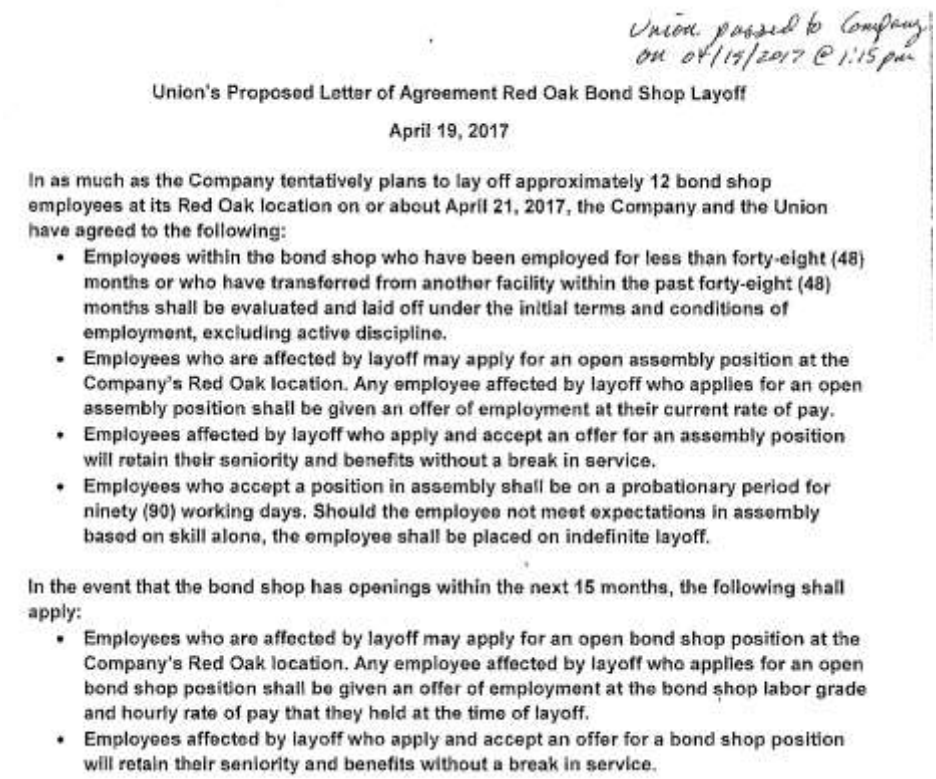
Further, in the interim period between the April 7 and April 19 bargaining sessions, the Union submitted another request for information to Triumph via e-mail on April 18, 2017. Tr. 96:1-7; Jt. Ex. R. The one-paragraph formal request was limited to "all evaluations of Bond Shop and NDI employees, the competencies used, who evaluated each employee, and anyone else that had input on the ratings." Jt. Ex. R. Because Triumph had planned to proceed with its employee evaluations via the *Competency Assessment*, the Union sought to ensure it knew how the process would be conducted and by whom. Tr. 96:4-19. Triumph did not respond to the information request until April 20, 2019, when the Company hand-delivered a letter to Ducker. Tr. 97:1-12; Jt. Ex. U. The employee ratings and competencies that were used in evaluations were attached, but Triumph did not provide the evaluations that it used to determine those ratings. Tr. 97:13-22; Ex. Jt.-U.

h. April 19 Bargaining Session

When the parties next met for negotiations on April 19, Ducker, the negotiating committee, and Portier participated for the Union, and Garrett, Bailey and Gil participated for the Company. Tr. 97:23-98:4; Ex. GC-5. Portier took comprehensive bargaining notes of the meeting, which began at 9:18 a.m. Tr. 98:5-99:11; Ex. GC-5. Drucker began the negotiation session by asking for Triumph's response to the Union's April 14 proposal and its April 18 information request. Ex. GC-5. The Company produced the bond shop employee timecards that the Union had requested on March 30 and then proceeded to discuss the status of the layoff negotiations. Tr. 99:13-20. Ex. GC-5, p. 2. Ducker made it clear that the Union wanted to continue to bargain: "We discussed that we still wanted to continue to bargain, and it was important for us to try to help those people get a job or keep their job and that the union had another proposal for the company." Tr. 99:21-25.

The parties then expressed their understanding of where each stood in the negotiations, with the Company stating that it had not developed any new proposals because it was unsure as to the Union's position. Ex. GC-5, p. 7. In particular, Portier recorded in her notes Garrett's statement as to the Union's April 14 letter, "I did not understand what the letter meant other than we're not going to reach an agreement but we'd like you to do this – and RAS, can't have any part of it." Ex. GC-5, p. 7. The parties then discussed Garrett's purported confusion. Tr. 292:10-22; Ex. GC-5.

The parties recessed the meeting to caucus only 24 minutes after it commenced. The Union then developed a new proposal that it presented to Triumph when the parties resumed bargaining at 1:14 p.m. Ducker explained that the April 19 proposal was designed to ensure that any bond shop layoff would not affect any unit employees with the longest tenure with Triumph who had transferred from either Jefferson Street or Marshall Street. Tr. 100:11-24. And the Union sought to ensure that affected employees would have an opportunity to obtain assembly jobs since Triumph was hiring contractors for those jobs. Tr. 101:1-6. The Union's April 19 proposal is set forth below.



Union passed to Company on 04/19/2017 @ 1:15 pm

Union's Proposed Letter of Agreement Red Oak Bond Shop Layoff

April 19, 2017

In as much as the Company tentatively plans to lay off approximately 12 bond shop employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- Employees within the bond shop who have been employed for less than forty-eight (48) months or who have transferred from another facility within the past forty-eight (48) months shall be evaluated and laid off under the initial terms and conditions of employment, excluding active discipline.
- Employees who are affected by layoff may apply for an open assembly position at the Company's Red Oak location. Any employee affected by layoff who applies for an open assembly position shall be given an offer of employment at their current rate of pay.
- Employees affected by layoff who apply and accept an offer for an assembly position will retain their seniority and benefits without a break in service.
- Employees who accept a position in assembly shall be on a probationary period for ninety (90) working days. Should the employee not meet expectations in assembly based on skill alone, the employee shall be placed on indefinite layoff.

In the event that the bond shop has openings within the next 15 months, the following shall apply:

- Employees who are affected by layoff may apply for an open bond shop position at the Company's Red Oak location. Any employee affected by layoff who applies for an open bond shop position shall be given an offer of employment at the bond shop labor grade and hourly rate of pay that they held at the time of layoff.
- Employees affected by layoff who apply and accept an offer for a bond shop position will retain their seniority and benefits without a break in service.

Tr. 100 :1-10 ; Jt. Ex. S ; Ex. GC-5, p. 8.

The Union's April 19 proposal was the last formal proposal presented by either party regarding the bond shop layoff. Tr. 101:19-102:1. The parties discussed the proposal at the April 19 bargaining session, but Triumph's principal focus with regard to the proposal was on "the pay situation." Tr. 101:7-18. As of April 19, management was not willing to let bond shop employees transfer and still retain their hourly wage rates. Tr. 101:7-18. Garrett testified regarding her response to the Union's August 19 proposal, which she believed had already been considered and rejected. Tr. 297:6-9. She stated that the terms of the proposal amounted to a layoff based on seniority and would have permitted employees who moved into assembly jobs to retain their current wage rates, both terms that Triumph had already rejected. Tr. 294:10-296:7. Garrett further testified that the last part of the Union's proposal called for recall rights for employees who were laid off and did not transfer to assembly, but Triumph would not extend any recall rights since they

were not part of the initial terms and conditions of employment. Tr. 296:8-25. Her view was that recall rights could result in the Company being obligated to bring back poor performers, which conflicted with the RAS procedures. Tr. 296:25-297:5.

At the April 19 bargaining session, Garrett informed the Union's representatives of Triumph's decision to proceed with implementation of the bond shop layoff under the Company's initial provisions. Tr. 102:18-103:1. The Union asked the Company to delay the layoff in light of the fact that the parties had not had many negotiation sessions and that some of the meetings had also involved other subjects. Tr. 103:2-10. Ducker stated repeatedly throughout the meeting that the Union "really wanted the opportunity to continue to bargain." Tr. 140:9-14.

Although Garrett said that the Union had had one month to bargain, in fact the April 19 session was only the fourth bargaining session as the Union had "asked the company to be nice and give us more time." Tr. 103:4-10. Garrett responded that Triumph would not agree to more negotiation sessions because "it wasn't to their business needs." Tr. 103:11-18. Garrett recalled responding that the Company was willing to discuss the matter further that day, but that management would notify affected employees the next day. Tr. 292:23-293:4. Triumph never explained to the Union why the layoff had to be carried out by April 21. Tr. 103:19-23; 104:11-22. In the Company's view, its representatives went into the April 19 meeting having made a modified proposal on the issue of employee selections for layoff that the Union had rejected. Tr. 293:12-15. Garrett believed that the parties had already discussed the seniority and transfer pay rates issues without reaching an agreement. Tr. 293:12-23.

The parties did not actually have one month to bargain any layoff issues as the negotiations were abbreviated and limited. Although Triumph notified the Union of the proposed layoff on March 28, 2017, the Union received the notice on March 29 and responded to the Company

promptly on March 30. Tr. 105:17-106:3. Then, Triumph informed the Union that the parties could bargain over the layoff at three previously-scheduled bargaining sessions April 5, 6 and 7, but then they could not meet again until April 19 since their representatives were out of town, so more than a week was not available for bargaining. Tr. 106:4-10. Of the four meetings of the parties with respect to the bond shop layoff, the principal focus of the first two meetings on April 5-6 was on other issues with minimal discussion of the pending layoff. Tr. 106:20-107:3. Had Triumph delayed the layoff and given the UAW more time to negotiate, the Union would have had ample time to obtain sufficient information about the employees who were working in assembly and what tasks they were performing. Tr. 141:14-23.

Triumph had rejected all Union proposals at the end of the April 19 meeting. Tr. 141:4-8. The Union did not present another proposal because although Garrett did not use the term *impasse*, she had stated that "she was through" and there was not sufficient time to develop additional proposals since the Company gave notice of layoffs to affected employees the next day. When the parties began the next round of negotiations the following week, Triumph declined to discuss the layoff because it had already occurred. Tr. 172:10-15. Although Barker was unable to attend the April 19 meeting, he was in contact with Union representatives and it was his understanding that the Company had made its decision and would not engage in further discussions regarding the layoff even though the Union kept introducing and exploring more alternatives. Tr. 189:10-23.

When asked on rebuttal if Triumph had ever presented the Union with a document or a proposal to avoid layoffs that the Company had characterized as a *last, best, and final offer* during the period of April 14 to April 19, Barker responded, "No. Absolutely not." Tr. 10-15.

i. Negotiations Timeline

In summary, the evidence introduced at hearing reflects the following timeline of the entirety of the parties' negotiations with regard to the bond shop layoffs from the time that Triumph gave notice of the layoff on March 28, 2017 until it effected the layoff on April 21, 2017:

March 28 Triumph first informed Union of its tentative plan to lay off 12 employees in Red Oak bond shop in 24 days, on April 21, 2017. Jt. Ex. G.

March 29 Union received and reviewed Triumph's notice. Tr. 105:17-106:3

March 30 Union submitted information request to Triumph. Jt. Ex. H.

March 31 Triumph presented incomplete response to Union's request for information, failing to provide the requested (1) segregated list of employees who had been hired at Red Oak who did not come from either Jefferson Street or Marshall Street, and (2) attendance cards for all bond shop employees for the one-year period from April 1, 2016 through April 1, 2017. Tr. 74:22-75:22; Jt. Ex. J.

April 5 First negotiation session lasted a total of one hour, 35 minutes, approximately one hour of which was caucus time; much of joint session was spent bargaining unrelated wage proposals. Ex. GC-2. Triumph made loan proposal vesting sole discretion in management with no effect on compensation, and the parties' discussed Company's failure to provide a complete response to Union's March 30 information request. Ex. GC-3.

April 6 Parties' second bargaining meeting lasted seven hours, fifteen minutes, of which only approximately one hour, fifteen minutes was spent in joint session, and a portion of that joint session was spent in discussing unrelated wage proposals. Remaining six hours of the bargaining session were spent in caucus. Ex. GC-3. Union made a counterproposal to Triumph's April 5 proposal that included provision for loan volunteers, no effect on wage rates, and placing loaned employees into positions to be successful [Jt. Ex. L]. Later the same day Triumph responded with a counteroffer to proposal that included no effect on compensation, sole discretion for selection vested in the Company, and agreement to meet with Union regarding concerns as to loans [Jt. Ex. M]. However, only 45 minutes later Triumph announced that proposal was rescinded and that management had made the decision to proceed with permanent layoffs. Tr. 87:22-88:6, 107:23-108:10, 162:11-17, 81:15-182:12.

April 7 Parties' third bargaining meeting lasted a total of two hours, 35 minutes on the record, less than half of which was spent in joint session, plus an off-the-record afternoon meeting. Ex. GC-4. The Union presented new information request concerning unit employees that had been hired since February and had received skills training to obtain assembly certifications. Union made a new proposal that did not involve a loan, but transfers to assembly based on seniority with no effect on compensation [Jt. Ex. O]. Triumph countered off-the-record with a modified RAS proposal for transfer into assembly with pay rate commensurate with assembly skills. Jt. Ex. P.

April 8-18 No bargaining sessions held as Triumph representatives were unavailable.

April 14 During bargaining hiatus, Union sent Triumph a letter rejecting its April 7 proposal and also withdrawing Union's April 7 proposal. Jt. Ex. Q. Union also noted that due to the time constraints, the parties may not reach an agreement on procedure before the layoffs, but puts forth several terms and conditions that Union would like to see implemented with regard to the layoffs, including retirement incentives. Jt. Ex. Q.

April 18 Union also made a one-paragraph formal information request to Triumph for "all evaluations of Bond Shop and NDI employees, the competencies used, who evaluated each employee, and anyone else that had input on the ratings." Jt. Ex. R.

April 19 Parties' fourth day of bargaining with regard to the layoffs lasted five hours, 12 minutes, only one hour, 40 minutes of which was spent in joint session. Ex. GC-5. Triumph provided the bond shop attendance cards that Union had requested on March 30. Company stated it could not respond to the Union's letter of August 14 because it did not understand Union's position. Union expressed willingness to stay as long as it took to get an agreement. After caucus, Union presented another proposal that included a seniority component, ability to obtain employment in assembly at current pay rate, probationary period in assembly, and rehire into the bond shop in the event of openings within the next 15 months [Jt. Ex. S]. Nevertheless, Triumph indicated that it would proceed with announcing the layoffs the following day. Tr. 141:234-142:3, 164:19-22.

April 20 Triumph informed affected employees of the layoffs. Tr. Tr. 141:24-142:3; 164:19-22.

April 21 Bond shop layoffs were implemented. Tr. 104:23-105:4.

j. Triumph Carries Out the Layoffs on April 20-21, 2017

Triumph informed the 12 affected employees on April 20 and laid them off on April 21. Tr. 104:23-105:4. The layoff impacted only the bond shop as Triumph rescinded the NDI layoffs because that management group did not want to lose its skilled employees. Tr. 105:1-8.

After the layoff was implemented, the Union obtained the attendance cards and RAS rankings that it had requested but had not received during negotiations. Tr. 304:22-305:3. The Union believed that the results of the RAS as used in the layoffs were inaccurate and inconsistent. Tr. 206:18-25. For example, the Union found that Triumph had used the attendance record of Michael Kindley in the RAS when he had no attendance deficiencies. Tr. 433:20-434:14. Ducker had discussed this matter with management. Tr. 434:9-22, 436:14-437:3. Barker believed other inconsistencies were found, but he could not then recall what they were. Tr. 12-22.

Barker concluded that Triumph had violated its bargaining obligations with respect to the bond shop layoffs. Tr. 206:9-13. He needed to be able to measure a RAS process in order to consider it. Tr. 207:1-4. He recalled that the Union had requested more information with regard to the Company's ranking of employees, but management responded that there was no reason to provide it because the ranking had already been completed. Tr. 207:8-21. Triumph never explained to Barker why the layoffs had to occur by April 21, 2017. Tr. 190:21-191:3. The Union never ceased negotiating until the time the Company announced its final layoff decision. Tr. 191:13-16.

Garrett stated that the timing of the layoff and the number of employees laid off were not her decisions, and her only role was to negotiate the outcome. Tr. 363:15-18. She made it clear to the Union that "absent any agreement or any further discussions that were going to be fruitful, that we were going to proceed with a [sic] April 21." Tr. 364:5-10.

Rowe testified initially that there was no substantial increase in overtime after the layoff, and the bond shop did not encounter any difficulties in meeting the customers' product demands. Tr. 394:15-395:1. She believed that 12 was the correct number of employees for the April layoff and that April 21 was the correct date to implement it. Tr. 396:5-12. On cross-examination, however, Rowe admitted that following the layoffs, some bond shop employees were working seven days per week, including overtime. Tr. 405:10-15, 409:6-21. Inexplicably, Rowe did not consider reducing overtime work in an effort to reduce the number of employees laid off in April 2017. Tr. 403:3-405:8.

k. Unbeknownst to the Union, Triumph Considers Conducting the Layoffs in Two Stages

The Union discovered at hearing that during the course of the negotiations over the April 2017 layoff, Triumph had considered conducting the layoff in two stages with implementation of

the second stage as late as June 2017, while representing to the Union throughout negotiations that business conditions made it necessary to lay off all 12 employees by April 21. Indeed, on April 7, the second negotiation session concerning the layoff, Garrett and Porter were planning to conduct the bond shop layoff in two stages, with the second stage being as late as June 2017. Tr. 365:19-366:10; Ex. CP-1. Although the parties were engaged in negotiations at the time, Garrett admitted she did not inform the Union that management was considering laying off some of employees in June. Tr. 366:11-367:21. Garrett never disclosed to the Union that there might be a two-stage layoff. Tr. 368:22-25. She stated that she did not know the source of Porter's information even though he was her subordinate. Tr. 369:8-14.

Further, on April 13, 2017, at a time when the parties were in the midst of a 12-day bargaining hiatus, Blake Mansfield, Industrial Engineer, sent Rowe an e-mail with an attached head count analysis. Ex. GC-10. The e-mail reflects Mansfield's recommendation that Triumph lay off nine full-time employees and two contractors. Ex. GC-10. Mansfield sent a follow-up e-mail to Rowe one hour and 17 minutes later in which he indicated that the Company was contemplating a two-step reduction in force. Ex. GC-10.[7] The e-mail also reflects that Triumph was considering a layoff of less than 12 people in the bond shop, and that two of them would be contractors rather than unit employees.

Asked about the e-mail, Garrett verified with Rowe that there were no contractors in the bond shop prior to implementing the bond shop layoff, but she did not know what happened to the two contractors referenced in the e-mail, which was sent only one week before 12 employees were notified of their layoff. Tr. 360:14-23. Garrett also had a discussion with Rowe as to whether the

[7] Regarding the person referred to as "Terry" in the e-mail, Garrett explained that Terry Baggett was the Bond Shop Director and Rowe was the Bond Shop Manager at that time. Tr. 361:17-23.

layoffs in the bond shop would be carried out as one reduction-in-force or whether there would be two separate reductions-in-force, based on timing and headcount patterns. Tr. 362:4-14. Garrett again admitted that she never disclosed to the Union that management was considering conducting the layoff in two stages. Tr. 364:11-15.

l. Post Layoff Bargaining

The parties met for first contract negotiations on their previously scheduled bargaining dates of April 20, 21, 26, 27 and 28. Tr. 297:25-298:20. Garrett stated she would have considered a new Union proposal if it "was different from the ones that they continued to pass across the table that the Company rejected." Tr. 298:21-299:3. She believed that "to continue to discuss the very same things that we can't agree on, doesn't seem like a … useful exercise." Tr. 299:1-3.

On April 28, 2017, the parties resumed negotiations for a first contract at the Red Oak facility. Tr. 417:9-15. Portier took contemporaneous notes of the meeting. Tr. 418:23-420:7; Ex. GC-11. The Union presented two requests for information to Triumph; Garrett asked why the Union sought the requested information and expressed her view that it was not relevant. Tr. Tr. 417:16-418:6; Ex. GC-13, GC-14. The Union replied the information was relevant to the layoffs, and that Union representatives wanted to do "its checks and balances" to ensure the employees laid off actually had disciplinary records. Tr. 418:6-9. Moreover, because at least some of the relevant disciplinary actions were progressive in nature, the Union wanted to ensure that all necessary warnings had been given to affected employees. Tr. 418:6-20, 423:13-424:16.

In addition to fulfilling the UAW's representational duty to ensure that the layoffs were implemented correctly, the Union had a secondary purpose in learning how the RAS method of layoffs was implemented in order to understand how future layoffs would be administered under the first CBA. Tr. 423:13-424:16. Moreover, the Union sought to review information about certain

matters in addition to attendance records. Company representatives replied that the layoffs had already occurred and that the requested information would not change the outcome, but the Union insisted it was entitled to the information that was used to determine which employees had been laid off in order to verify that the records were correct. Tr. 418:15-20.

Garrett responded to the Union's information requests by letter to Barker dated May 2, 2017. Tr. 424:18-425:15; Ex. GC-14. She indicated some confusion with regard to the information request so Barker followed up with a clarification letter to her dated May 8, 2017. Tr. 425:16-426:22; Ex. GC-15. Garrett never responded to Barker's May 8 letter. Tr. 427:9.

In late April or May 2017,[8] Barker sent a letter to Garrett requesting disciplinary files for eleven of the laid-off employees, asserting the Union's view that disciplinary issues, which the Union had no opportunity to bargain, were a contributing factor to the layoff of some, if not all, of such employees. Tr. 412:23-417:6; Ex. GC-12.

III. Argument and Authorities

A. The Administrative Law Judge's Decision Does Not Provide an Adequate Basis for the Board's Review

It is readily apparent that Judge Ringler's *Decision* does not provide an adequate basis for the Board's review of the Company's cross-exceptions in that it does not comply with Board Rule 102.45(a), which requires that the ALJ's "decision will contain findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions . . .." More than half of the 12 and one-half page *Decision* consists of nothing more than quotations at length of the parties' various written proposals and other hearing exhibits (along with extensive section headings). With

[8] Although the letter is dated April 24, 2017, the parties debated whether the date should have been May 24, and the letter was admitted without deciding the date issue. Tr. 416:19-417:6. The confusion arose because a notation by the name of Rodney Horn on the list of employees for whom files were requested indicates that his information was "received 05/23/2017." Ex. GC-12.

regard to the bond shop layoffs in particular, the entire *Analysis* section, *Conclusions of Law* section, and the Judge's recommended *Order* combined comprise a total of only two pages. Accordingly, the Board should remand this matter to Judge Ringler for the preparation of a supplemental opinion. *See Aramark Corp*., 353 NLRB 993, 993 (2009) (declining to pass on the merits and remanding the case to the administrative law judge for further findings of fact, analysis, and conclusions of law in conformity with the Board's rules and regulations); *Webb Furniture Enterprises*, 272 NLRB No. 56 (1984) (remanding the case for the issuance of a supplemental opinion in compliance with Rule 102.45(a)).

First, the *Decision* does not address the credibility of any of the four witnesses who testified at the hearing even though the General Counsel devoted nearly six pages of his post hearing brief to identifying for the ALJ those factual disputes requiring credibility determinations, and arguing that those credibility determinations should be resolved in favor of the General Counsel's witnesses. *Counsel for the General Counsel's Brief to the Administrative Law Judge* at pp. 30-35. Second, the *Decision* fails to fully discuss the testimonial and documentary evidence and address the parties' contentions in light of the credited evidence. *See Aramark*, 353 NLRB at 993 ("Notably, the judge's supplemental decision failed fully to discuss the record evidence, make findings of fact and credibility resolutions with respect to the testimony presented, and address the parties' contentions in light of the credited evidence, and the judge failed to set forth conclusions of law.")

B. The Temporary Reduction in Customer Orders in the Bond Shop Was Not an Actual Economic Exigency

The existence of an alleged *economic exigency* underlies the bulk of the Company's arguments in support of its cross-exceptions, so it is crucial to note up front that there was no

actual economic exigency. Triumph erroneously asserts that it is "undisputed" that the "layoffs were a result of exigent circumstances – customer order levels – requiring prompt action" (*see* R. Br. at 28), as the Union does this allegation. Triumph did not present a shred of evidence at the hearing to indicate that the anticipated decline in customer orders was anything more than a minimal, temporary, and discretionary financial maneuver. The decision to lay off twelve bond shop employees clearly was not compelled;" rather, it was nothing more than a garden-variety cost-cutting measure.

Triumph's "economic exigency" mantra had its genesis in a joint stipulation between the General Counsel and the Company. The Counsel for the General Counsel generously stipulated there would be no allegation made at hearing that there were no exigent circumstances such that the Company had a duty to bargain to overall impasse before making unilateral changes:

> In late 2016 and early 2017, Respondent experienced a decrease in anticipated orders from customers Bell and Gulfstream that impacted bond shop staffing needs, which triggered the business rationale for the March 28, 2017 letter (Joint Exh. G) and offer to bargain. **The General Counsel <u>does not allege</u> that Respondent's business rationale failed to qualify as exigent circumstances such that Respondent had a duty to bargain to overall impasse or agreement with the Union on a collective bargaining agreement prior to making unilateral changes**.

Jt. Ex. Z, No. 19. (emphasis added). *See* Resp. Br. at 6-7. Notably, the General Counsel did not concede in the joint stipulation that exigent circumstances *did in fact exist*; rather, the General Counsel merely agreed in the nature of a plea of *nolo contendere* that it did not "*allege* that Respondent's business rationale failed to qualify as exigent circumstances" for purposes of relieving the Company of it duty to first bargain to an overall impasse *Id*. (emphasis added).

It is apparent that the joint stipulation was in reference to the Board's decision in *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (1994), amplified in *RBE Electronics*, 320 NLRB 80, 82 (1995), in which the Board crafted two limited exceptions to the

general rule that an overall impasse in bargaining is required before an employer can lawfully implement unilateral changes during the negotiations for a collective bargaining agreement: (1) when a union engages in bargaining delay tactics, and (2) when economic exigencies compel prompt action. *Id*. sat 374. The Board has limited application of the second *Bottom Line* exception for "economic exigencies" to situations involving "'extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" *Connecticut Institute for the Blind, Inc.*, 360 NLRB 359, 403 (2014) (quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)).

In *RBE Electronics*, the Board amplified *Bottom Line* when it recognized a second, lesser level of economic exigency that, though not sufficiently compelling to excuse bargaining altogether as under the *Bottom Line* exception, will allow an employer to satisfy its statutory bargaining obligation by "providing [the union] with adequate notice and an opportunity to bargain over the changes it proposes in response to the exigency *and by bargaining to impasse over the particular matter*." *RBE Electronics*, 320 NLRB at 82 (emphasis added). Thus, under the *RBE Electronics* exception, an employer that is in the process of bargaining a labor contract may take unilateral action without first bargaining to an overall contract impasse in the event of an economic exigency, but only if the parties have first bargained to an impasse on the particular proposed change. *RBE Electronics* at 81-82. Although less stringent than the *Bottom Line* exception, the *RBE Electronics* exception for less compelling economic emergencies is nevertheless not designed for garden variety cost-cutting. Rather, it is limited to situations "in which time is of the essence and which demand prompt action," issues on which the employer has the burden of proof. *Connecticut Institute for the Blind, Inc*., 360 NLRB at 403 (upcoming date triggering eighteen percent increase in company's insurance premiums for employees was not an "economic

exigency" in which time was of the essence, and the company's unilateral action was not "compelled;" rather, the company simply did not want to pay any portion of the cost increase).

Thus, the General Counsel's stipulation relieved Triumph from having to prove that it satisfied either the *Bottom Line* or the *RBE Enterprises* economic exigency as a prerequisite to carving out bargaining over the bond shop layoffs from the bargaining over a first contract as a whole, as it is undisputed that there was no overall contract impasse. The General Counsel perhaps made the generous stipulation in view of the fact that the Union had voluntarily chosen in March and April 2017 to accommodate Triumph by carving out the bond shop layoffs issue from the overall contract negotiations without regard to whether a *Bottom Line* exception was satisfied.[9] The Union's accommodation allowed the Company to proceed with bargaining the layoffs issues without waiting until the conclusion of the parties' first contract negotiations, whether by an overall impasse or by execution of a CBA.

Without evidentiary support other than the General Counsel's *nolo contendere* stipulation, Judge Ringler found as a preliminary matter that that the anticipated bond shop layoffs "required immediate action" and that Triumph "satisfied its burden of demonstrating an economic exigency requiring immediate redress that could not wait for the finalization of a collective bargaining agreement that occurred a year later." ALJD 12:23-25. The Union has excepted to these findings

[9] The stipulation was presented to the ALJ as a *fait accompli* at hearing. However, the General Counsel and UAW accepted the stipulation based on incomplete and undisclosed information. In this regard, the Union notes that, in response to a subpoena duces tecum issued at the request of Counsel for the General Counsel, Triumph produced numerous documents for review and inspection on the morning of the hearing. Among the documents produced for the first time were various e-mails reflecting that Triumph was not confronted with any economic exigency requiring immediate action in April 2017. These e-mails reflected, among other things, that the Company considered conducting the layoff in two stages with the second stage not occurring until June. And on cross-examination, Eileen Rowe admitted that following the layoff the remaining bond shop employees were required to work a substantial amount of overtime in order to meet the department's work requirements. Accordingly, the General Counsel could have withdrawn the economic exigency stipulation following the disclosure of this new evidence.

in that they were not only erroneous in light of the abundant evidence that there was no actual economic exigency, but were also unnecessary in light of the General Counsel's stipulation that it would not contest the issue of the existence of an economic exigency. Jt. Ex. Z, No. 19. Triumph apparently mistook the Union's exceptions to the ALJ's finding that an economic exigency existed as an effort to overturn the General Counsel's Joint Stipulation No. 19. In fact, honoring the General Counsel's stipulation, the Union does not argue that the Company had a duty to first bargain to agreement or overall impasse on the first contract before implementing the bond shop layoffs. *Id*. Rather, the Union lodged these exceptions to the extent that the ALJ's unnecessary and erroneous findings of an actual economic exigency have implications for the analysis of the separate and central issue that was before the ALJ and is now before the Board: Whether there was a genuine bargaining impasse in the layoff negotiations in particular.

Indeed, as the Union anticipated, Triumph now attempts to bootstrap the General Counsel's stipulation that it would not allege that lack of exigent circumstances so as to relieve Triumph from having to bargain to an overall impasse into a stipulation that an actual economic exigency existed for all purposes. To the contrary, Triumph's April 21 deadline for the layoffs was a self-imposed arbitrary deadline, and the amount of money, if any, that it would have cost Triumph to move it in order to bargain with the union in good faith to a genuine impasse would have amounted to nothing more than a drop in the bucket for an employer the size of Triumph, and the Company has not even attempted to meet its burden of proving otherwise.

C. Triumph's Alternative Grounds for Dismissal Are Without Merit (Response to Cross-Exceptions 4-16)

1. Triumph's Preliminary Cross-Exceptions to the ALJ's Factual Findings (Response to Cross-Exceptions 5-11)

Triumph first cross-excepts to four of the ALJ's fact findings that it characterizes as "minor descriptive errors" that "do not affect the judge's substantive analysis of impasse." R. Br. at 25. First, Triumph contends that the ALJ "incorrectly referred to the Union's April 14 letter to Triumph as a "counter" and as a "proposal," arguing that the bargaining notes do not reflect that either Triumph or the Union considered the letter to be a proposal. R. Br. at 25 (citing ALJD at 9:7, 9:45; R. Ex. 7 at 4; and GC Ex. 5 at 4). To the extent that this is a distinction with a difference for purposes of determining whether the parties were at a genuine impasse, there is clearly contrary record evidence on which the ALJ probably based his characterization. Indeed, Triumph entered into two stipulated facts with the General Counsel that each characterizes the April 14 letter as a "proposal." *See* Jt. Ex. Z, No. 28 ("On April 14, 2017, the Union sent Respondent a letter . . . making several new counterproposals. . .") and No. 30 ("The Company rejected the Union's proposal contained in the April 14, 2016 [sic] letter."). Regardless of the characterization of the April 14 letter as a "proposal" or as something else, it is abundantly clear that by way of the letter, the Union intended to convey that it was still trying to work toward an agreement with the Company with regard to the bond shop layoffs. *See, e.g.*, Ex. GC-5 at 4 (Ducker explained to Garrett that the purpose of the April 14 letter was to "putting more things in front of [the Company] to try to get a settlement for this instant agreement we still seek on [the bond shop layoffs].")

Second, the Company complains that the ALJ described the parties' April 19 discussions out of order in that he stated that the Union asked for additional days to bargain *after* Triumph had rejected the Union's proposal, rather than *before*. R. Br. at 25-26 (citing ALJD at 10:26-30). Although the Union agrees that it did ask for more days to bargain before making its afternoon proposal of April 19, it is unclear what support Triumph believes this correction lends to the ALJ's finding of impasse. When the Union asked for additional days to bargain in the morning session,

Garrett made clear to the Union that the Company wanted to inform the employees of the layoffs at 10:00 a.m. the next day, April 20, and that extending the bargaining through April 21 was "not feasible." Ex. GC-5 at 6 ("I want to be wholeheartedly, to use your term, clear – these are scheduled for 10:00 a.m. tomorrow."). Ex. R-7 at 8. Although the bargaining notes reflect that Garrett denied Ducker's statement that Garrett was refusing to even consider an extension (which denial apparently caused Triumph's negotiators to snicker among themselves), she did clearly state that the Company would not move the date if it did not look like the parties were not going to agree on a proposal. Ex. GC-5 at 6-7; Ex. R-7 at 8. Thus, in light of Garrett's adamant position taken in the morning session, it is clear that when Triumph unequivocally rejected the Union's afternoon proposal in the same afternoon, it would have been futile at that point to reiterate the Union's reasonable request for more time.

Third, Triumph takes issue with the fact that the ALJ referred to the Company's April 5 loan proposal as its "initial proposal" instead of its March 28 "official notification" letter, which the Company insists is its "initial proposal." R. Br. at 26 (citing ALJD 6:38).[10] Although this argument seems to be irrelevant for purposes of determining whether the parties were at a genuine impasse before April 21, the Union notes that the Company's March 28 letter only notifies the Union of its tentative plans with regard to the layoffs and offers to meet to discuss them. It does not "propose" anything. Although the Company stated that it was "willing to discuss a potential loan agreement," it did not offer one to the Union in the March 28 letter.

The Union agrees with Triumph's fourth correction of the ALJ's fact findings, which is that Judge Ringler erroneously stated that the Company conducted the layoffs in accordance with

[10] It is ironic that Triumph takes umbrage at the ALJ's reference to the Union's April 14 letter sent during the course of bargaining as a *proposa*l, while at the same time the Company insists that its own notice sent before bargaining had even commenced should be referred to as its *proposa*l.

its last layoff proposal, when it in fact conducted them in accordance with its status quo layoff policy. R. Br. at 26.

2. The Relative Number of Days of Notice and Bargaining Provided Is Not Determinative of Whether a Bargaining Violation Occurred (Response to Cross-Exception 12)

Without citing any Board law establishing such a *framework*, Triumph argues that there is a "bargaining framework for layoffs motivated by economic exigencies," which it claims is *expedited.* R. Br. at 26. Here, Triumph seems to contend that an inquiry into whether the employer complied with the Act focuses primarily, if not exclusively, on the relative number of days of notice and bargaining that the employer allowed before implementing a unilateral change without regard to whether the parties negotiated in good faith and reached a genuine impasse in their bargaining during that allowed time. R. Br. at 26-27 (arguing that "because bargaining need not be protracted, an employer generally complies with Section 8(a)(5) with several weeks' notice and bargaining."). In support of this argument, Triumph cites only *Gannett Co*., 333 NLRB 333, 357 (2001) as an illustrative decision. However, that case does not at all establish a special framework for expedited bargaining in case of an economic exigency; indeed, the ALJ expressly found that there was no "emergency or other unusual circumstances alleged" in that case. 333 NLRB at 358.

Prior notice and an opportunity to bargain of any length does not, in and of itself, satisfy the employer's bargaining duty under the Act. Instead, the employer must bargain to impasse. *See RBE Electronics*, 320 NLRB at 82 (an employer that has demonstrated an economic exigency "would satisfy its statutory obligations by providing adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency *and* by bargaining to impasse over the particular matter.") (emphasis added). While the Board in *RBE Electronics* did state that in actual economic exigency situations "bargaining need not be protracted," the length of negotiations is

only one of the *Taft* factors, and whether notice was sufficient clearly depends on the facts of each case. The Board has stated that the union must make a timely request to bargain, which the UAW did in this case, and that bargaining should then occur in a timely and meaningful fashion. *Lapeer Foundry & Machine*, 289 NLRB 952 (1988). In this case, the issue is whether the bargaining that did occur in a timely fashion was *meaningful*.

Triumph cites a few cases in which the Board has found employers have satisfied their bargaining obligation with less notice and bargaining than what Triumph provided to the Union here; however, not only are those cases distinguishable on their facts, but there was no issue presented as to the existence of an impasse in any of those cases. *See KGTV*, 355 NLRB 1283 (2010) (Three weeks' notice was an adequate period to negotiate over layoff decision, but union did not request bargaining over the decision); *Paramount Liquor Co.*, 270 NLRB 339, 340-42 (1984) (Eleven days' notice of the layoff of one checker was sufficient when employer facing worsening economic conditions had conducted several layoffs of employees for over a year prior to the layoff at issue, company followed union's request to use seniority as the basis for the layoff, and there was no indication that either party thought there was anything further to discuss); *Burns Ford, Inc.*, 182 NLRB 753, 753-54 (1970) (Automobile dealership gave six days' notice of layoffs that were in a series of changes it had made in an effort to reverse a drastic decline in sales over the prior year; union did not request to meet until the day prior to the layoffs, and then had not much to say and did not make a request for information). In any event, the Union does not argue in this case that the number of days of notice given by the employer was insufficient on its face, but rather that the outcome of the negotiations that followed was not a good faith impasse.[11]

[11] Again focusing only on the number of days of bargaining, Triumph mentions in a footnote that the Regional Director for Region 16 dismissed a prior charge that Local 848 filed involving layoffs in the bond shop in May 2015 finding that Triumph had satisfied its bargaining obligation "despite less notice and bargaining than in 2017," citing

3. The Parties Engaged in Both Decision and Effects Bargaining and, In Any Event, Triumph Was Required to Bargain to a Genuine Impasse Over the Effects of its Layoff Decision Prior to Implementation (Response to Cross-Exception 13)

When an employer lays off represented employees for economic reasons, it must bargain with the union over both the layoff decision and the effects of that decision. *Lapeer Foundry & Machine*, 289 NLRB at 953-54. Triumph asserts that the UAW waived decision bargaining by not pursuing it and was therefore limited to bargaining over the effects of the decision. The Company then takes it a step further, arguing that the General Counsel's Complaint as to the bond shop layoffs should be dismissed because an employer is not required to bargain to impasse over effects before implementing its layoff decision. R. Br. at 29-34. The Company's argument is without merit on both fronts. First, the evidence reflects that the parties did engage in decisional bargaining by bargaining over alternatives to laying off the twelve bond shop employees in the first place. Second, Board law is clear that effects bargaining generally must be completed prior to implementation of the decision.

The Board requires an employer to bargain over economic layoffs to ensure that its employees' bargaining representative will have the opportunity to propose less drastic alternatives to layoffs. *Lapeer*, 289 NLRB at 954. ("Labor-related considerations therefore form the basis for the decision. As a union has control over this labor-related factor, it can offer alternatives to the layoff, such as wage reductions, modified work rules, or part-time schedules for a larger group, to save the company money during the economic downturn.") *See also Comau, Inc.*, 364 NLRB No. 48 (2016) (Member Miscimarra, concurring in part and dissenting in part) ("When decision

Ex. R-9 at 2. As previously noted, both Counsel for the General Counsel and the Union objected to and requested a running objection to all testimony concerning the 2015 Bond Shop layoff at Red Oak as being irrelevant to the 2017 Bond Shop layoff at issue. *See* footnote 4, *supra*.

bargaining is required -- which is not alleged here -- the employer must provide the opportunity for bargaining over potential alternatives to a tentative decision.") Thus, decisional bargaining involves whether a given decision should be made in the first place; whereas effects bargaining assumes the decision has already been made and is not subject to change, leaving only its effects for bargaining.

In this case, Triumph offered and the parties initially bargained a loan proposal to keep the 12 bond shop employees employed, *instead of* laying them off. This is in keeping with the desire that both Garrett and Ducker expressed from the initial meeting – both sides wanted to keep the 12 employees actively employed for as long as possible in lieu of laying them off. Jt. Ex. 4, at 6-7. On the first day of negotiations, Garrett stated the Company's position was to [k]eep them gainfully employed as long as we can," and Ducker responded, "we certainly would like to see people in the bond shop keep their jobs if we could work through the issues." *Id*. From the outset, once the Company announced that it "tentatively" planned to lay off 12 bond shop employees, the efforts of both parties were focused on alternatives to that tentative decision. The principal focus was decisional bargaining to avert a layoff at all relevant times.

Triumph's initial April 5 proposal included the statement that the proposed loans were "in lieu of layoff" as did the Union's April 6 response and the April 6 afternoon counteroffer (promptly withdrawn). Ex. Jt.-K-M. After the Company abruptly withdrew the possibility of loans, the Union put transfers on the table on April 7, again "in lieu of layoff." Ex. Jt.-O. It was not until the Company's April 7 counterproposal that any of the discussions turned from avoiding the tentative decision altogether to making proposals for how the layoffs would be handled if implemented. Ex. Jt.-P. At that point in the negotiations, it is evident that the parties were not anywhere close to an impasse on their bargaining over alternatives to implementation of the *decision*. Triumph's

argument that the relevant decision for identifying "decision bargaining" in this instance is limited to only the circumscribed question of whether and by how many the headcount *in the bond shop* should be reduced is not in keeping with the case law. Rather, the issue for decision bargaining should be whether and how many bargaining unit employees the employer will lay off.[12]

Triumph seeks to characterize the parties' bargaining efforts as only "effects" bargaining in order to establish the predicate for its misguided argument that it was not required to bargain with the Union to impasse on *effects* before implementing the layoffs. Triumph emphatically states at least twice that Board law and "precedent dating back many decades" makes clear that no impasse in effects bargaining is required pre-implementation, yet the Company does not cite a single decision in support of this sweeping proposition. R. Br. at 29, 31. This is understandable because the Board has held consistently that effects bargaining must be completed prior to implementation.

In this regard, it is well-established that effects bargaining must occur "at a meaningful time and in a meaningful manner." *First Nat'l Maintenance Corp*., 452 U.S. 666, 681-82 (1981). "Effects bargaining also must occur sufficiently *before actual implementation of the decision* so that the union is not presented with a fait accompli." *Komatsu America Corp*., 342 NLRB 649, 649 (2004) (emphasis added) (citing *Woodland Clinic*, 331 NLRB 735, 738 (2000); *Willamette*

[12] The two cases Respondent cites for the proposition that the Union's bargaining for alternatives in order to avoid the bond shop layoffs were effects bargaining, rather than decision bargaining, are inapposite. R. Br. at 32. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981), the Supreme Court held that the employer did not have an obligation to bargain its decision to effect a partial shutdown of its business. *Id*. at 681. It did not hold that alternatives to preventing the loss of jobs in the first instance were effects bargaining proposals; rather, the Supreme Court noted that such alternatives were things the union would have bargained for had it been allowed to bargain the decision, but since it was not, it could argue those things in connection with effects bargaining, which would be allowed. *Id*. The footnote of *Print Fulfillment Servs., LLC* that Respondent cites is nothing more than a quotation of a union staff representative's characterization of the union's bargaining as *effects*, and in any event, he referred to procedures to follow in connection with the RIF, not to alternatives to avoid the RIF in the first place. 361 NLRB 1243 n. 25 (2014).

Tug & Barge Co., 300 NLRB 282, 283 fn. 3 (1990)). This makes sense because if an employer was not required to bargain to impasse over effects before implementation, the union would have lost most of its bargaining leverage.

Triumph cites two Board decisions for the proposition that an employer need not reach impasse on effects before implementation, *Komatsu Am. Corp*. and *Port Printing Ad & Specialties*, 351 NLRB 1269, 1269-70 (2007), but those cases do not support the Company's argument in any respect. In *Port Printing*, the employer had unilaterally laid off employees due to an actual economic exigency caused by Hurricane Rita, but then failed to meets its obligation to bargain over effects. The Board ordered the employer to bargain with the union over the effects of the decision at the union's request. *Id* at 1270-71.

In *Komatsu*, the employer conducted a layoff during the course of the parties' negotiations over the effects of an outsourcing decision and continued to bargain over the outsourcing initiative after the layoff; the union then contended the layoff presented it with a fait accompli that precluded meaningful effects bargaining regarding the outsourcing initiative. 342 NLRB at 649-50. However, the Board found that the layoff was not in fact a partial implementation of the outsourcing initiative over which the parties were engaged in effects bargaining because there was no "causal nexus" between the outsourcing initiative and the reduction in force. *Id*. Tellingly, word searches of these two decisions reveal that neither decision even includes the term *impasse*, except that in *Port Printing Ad & Specialties*, the term *impasse* is included in the Board's remedial order. 341 NLRB at 1271.

4. Triumph's *Additional Evidence* Does Not Support the ALJ's Erroneous Finding That a Genuine Impasse Existed Before April 21 (Response to Cross-Exceptions 4-5, 9-12, 14-16)

Triumph asserts that certain evidence that Judge Ringler failed to discuss supports his finding of impasse, but in fact, the ALJ failed to discuss most of the testimony and other evidence. In their respective briefs in support of their exceptions, the Union and the General Counsel have each discussed the testimony and other record evidence at length and explained how the ALJ's cursory analysis using the *Taft* Factors resulted in his erroneous finding that a genuine impasse existed. *See U. Br.* at pp. 43-49; *Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge* at pp. 33-50. The "additional evidence" that the Company argues the ALJ failed to consider does not enhance the ALJ's finding of impasse.

Regarding the *Taft* factor of bargaining history, Triumph cites as additional supporting evidence only the 2015 layoff negotiations at Red Oak, to which the Union has previously noted it has had a running exception as to relevancy. R. Br. at 35. *See* footnote 4, *supra*. The 2015 layoffs are not being litigated in this proceeding.

With respect to the *Taft* factor of good faith in bargaining, Triumph merely corrals the few spare and largely conclusory statements that Judge Ringler did make about the evidence in his *Decision*, while at the same time, the ALJ wholly ignored all of the many indicia of the Company's bad faith that were present. *See* U. Br. at 45-46.

Triumph next argues that the fact that the parties disagreed on important issues does not indicate it acted in bad faith because it is not bad faith to insist on bargaining positions and have related disagreement, and, as the Company preferred the status quo policy over the alternatives considered, it had the right to reject alternatives. R. Br. at 37-38. However, although the parties did disagree on important issues such as issues of seniority versus RAS, wage rates upon transfer,

and volunteers versus Triumph's sole discretion to select employees for transfer, the evidence reflects that the parties were progressing toward a negotiated resolution that would include a combination of factors acceptable to both sides. The open issues certainly were not insurmountable or even inordinately difficult. Before the Company withdrew its loan proposal, both parties had accepted loaning bond shop employees to other departments as the linchpin of an agreement, and the remaining issues were subordinate to this framework.

Finally, Triumph's bald assertion that both parties understood they had reached impasse is contrary to the testimony and record evidence. The Company argues that the Union understood and never objected to the bargaining timeline (the arbitrary April 21 implementation date), and that it knew as early as April 14 that "the parties might not reach an agreement." R. Br. at 38. The question of whether the parties reached a genuine impasse looks to the totality of the circumstances using the factors set forth in *Taft Broadcasting Co*., 163 NLRB 475 (1967), and the evidence strongly supports a finding that no genuine impasse existed.

In this regard, the evidence conclusively shows that throughout the course of the negotiations over the layoffs and up until the date that Triumph unilaterally terminated bargaining, the Union never believed that an agreement could not be reached and it was searching for solutions at all times. This understanding continued until Garrett notified the Union that Triumph would proceed with implementation. Had the Company continued to negotiate, the Union certainly would have developed new and alternative proposals to avoid the layoffs, including proposals to eliminate or reduce overtime in the bond shop, lay off all contractors first, and conduct any layoffs in phases (had the Union known that the Company was considering conducting the layoff in stages).

The facts that the Union did not object to the Company's arbitrary deadline and later, as negotiations progressed, expressed concern that the parties might not reach an agreement, do not

indicate that the Union was waiving the white flag. *See* R. Br. at 38-39. Rather, the Union continued to press forward to come up with more proposals even as events transpired that the parties might not make the deadline, and later requested a very short amount of additional time to try to work out a solution, which Triumph unreasonably refused.

For her part, Garrett never declared the parties at impasse, but stated at the end of the April 19 meeting that "she was through" and that the Company would notify the employees of the layoffs the next day, which explains why the Union did not make an additional proposal on that date. Moreover, Triumph's assertion that the Union did not request post implementation bargaining is disingenuous. Garrett refused to discuss the layoffs at the parties' scheduled negotiations the following week for the reason that they had already occurred. Tr. 172:10-15.

Significantly, Triumph never presented a proposal characterized as a *last, best and final offer* and it never declared the parties were at an impasse. In this regard, Triumph's conduct in this case bears many similarities to that of the employer in *Connecticut Institute for the Blind*, 360 NLRB at 406-07, where the ALJ found that the company had not proved that either party believed it "had 'reached the end of their rope'" when the employer implemented unilateral changes ahead of a self-imposed deadline to avoid having to pay for an increase in healthcare costs. *Id*. at 408 ("Respondent's self-imposed deadline cannot create an impasse, especially where, as here, the evidence suggests that further bargaining could be productive."). Among other significant facts, the ALJ in that case found that during negotiations the company never asserted that the parties were at an impasse and that the company never characterized its offer as a final offer. *Id*. The ALJ stated that the employer's statement that it intended to implement its proposals on healthcare absent agreement or further counterproposals was not equivalent to a declaration that the company believed the parties to be at an impasse or that they had reached the end of their rope. Instead, the

ALJ found the statement to be simply an assertion that it would implement its proposals since the union had not met the company's self-imposed deadline to agree to healthcare changes. *Id*. Moreover, although the employer may have been frustrated with the union's pace in agreeing to concessions, "its frustration is not the equivalent of a valid impasse nor did it mean that a negotiated settlement was not within reach." *Id*. at 407. Finally, as occurred in this case, the ALJ found that the company's failure to fully comply with the union's information requests for relevant information further precluded a finding of a good faith impasse. *Id*. at 408.

5. Full Reinstatement and Back Pay Is the Appropriate Remedy for Triumph's Bargaining Violation (Response to Cross-Exception 17)

Triumph argues that even if the Board finds a statutory violation, the Board should award only the limited back pay remedy for bargaining violations set forth in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), because the General Counsel's requested remedy of full reinstatement and back pay has been used only as a remedy for failure to bargain a layoff decision, and not as a remedy for failure to bargain only over effects. R. Br. at 41. As discussed in Section II(C)(3), *supra*, the parties bargained over both the layoff decision and its effects; therefore, the General Counsel's requested remedy is appropriate in this case.[13] *See Lapeer Foundry & Machine*, 289 NLRB at 955.

IV. Conclusion

For the foregoing reasons, the UAW respectfully reaffirms its Exceptions and supporting arguments and requests the Board to find that Respondent violated the Act in the event it decides to address the case on the merits at this stage.

[13] As Respondent notes, it offered reinstatement to the employees in early 2018, and some employees accepted the offer and returned.

Dated February 19, 2020.

Respectfully submitted,

/s/*Rod Tanner*
Rod Tanner

Certificate of Service

The undersigned attorney for International Union, UAW and Local 848 certifies that on February 19, 2020, he served a copy of the foregoing document on the parties via electronic mail.

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